



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 169371

Pursuant to petition filed October 13, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, November 24, 2015 at 08:45 AM at , Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of Dane County who received FS benefits in Dane County from October, 2012 through March 30, 2015.
2. On September 10, 2012, the respondent submitted a FS renewal to the agency. She reported a residence in Madison, Wisconsin. She reported a household of two, including herself and her minor nephew.

3. On September 21, 2012, the agency issued a Notice of Decision to the respondent informing her that she would continue to receive FS benefits of \$364/month effective October 1, 2012. The notice also informed her of the requirement to report to the agency within 10 days any change in address or change in residence.
4. On March 11, 2013, the respondent submitted a Six Month Report Form (SMRF) to the agency. She answered "No" to the question of whether she had moved to a different address. She reported herself and her nephew in the household.
5. On March 12, 2013, the agency issued a Notice of Decision to the respondent informing her that she would continue to receive FS benefits. The notice also informed her of the requirement to report to the agency within 10 days any change in address or change in residence.
6. On September 9, 2013, the respondent submitted a FS renewal. She reported a residence in Madison, Wisconsin. She reported a household of two, including herself and her nephew.
7. On September 10, 2013, the agency issued a Notice of Decision to the respondent informing her that she would receive FS benefits of \$331/month effective October 1, 2013. The notice also informed her of the requirement to report to the agency within 10 days any change in address or change in residence.
8. On April 11, 2014, the respondent submitted a Six Month Report Form (SMRF) to the agency. She reported a residence in Madison, Wisconsin. She reported a household of two, including herself and her nephew.
9. On April 15, 2014, the agency issued a Notice of Decision to the respondent informing her that she would receive FS benefits of \$313/month effective May 1, 2014. The notice also informed her of the requirement to report to the agency within 10 days any change in address or change in residence.
10. On October 10, 2014, the respondent submitted a Six Month Report Form (SMRF) to the agency. She reported a residence in Madison, Wisconsin. She reported a household of two, including herself and her nephew.
11. On October 17, 2014, the agency issued a Notice of Decision to the respondent informing her that she would receive FS benefits of \$241/month effective November 1, 2014. The notice also informed her of the requirement to report to the agency within 10 days any change in address or change in residence.
12. In June, 2015, the agency received a school enrollment history for the respondent's nephew reporting that in or about January, 2014, respondent's nephew transferred to a school in [REDACTED] Wisconsin. It further reported that in or about September, 2014, respondent's nephew enrolled in a school in [REDACTED] Wisconsin. It further reported that in or about November, 2014, he transferred to a school in [REDACTED] Wisconsin. In addition, school enrollment records do not report respondent as part of his household.
13. On July 1, 2015, the agency received an employer verification for the respondent from [REDACTED] Care located in [REDACTED]. The employer verified the respondent was hired January 1, 2015 – present.
14. On July 30, 2015, the respondent contacted the agency. The respondent reported that she resides in Madison and works in [REDACTED]. She reported that she stays with relatives in [REDACTED] during the week and lives in Madison on weekends. She provided her new Madison address to the agency. The agency verified that the address provided by the respondent is not a valid address.
15. On October 2, 2015, the agency received verification from the landlord of the apartment reported by the respondent as her residence in Madison, Wisconsin from 2013 – 2015. The verification from the landlord indicates that the apartment reported by the respondent was rented to two other tenants (not including respondent or respondent's nephew) from 2013 – 2015.
16. Respondent's EBT card usage was analyzed by the agency. The agency found that respondent's card was used in Wisconsin in January, 2013 (9 transactions) and February, 2013 (17 transactions). From March, 2013 – December, 2013, respondent's card was used only for transactions in Illinois (10 transactions in March and May) and Minnesota (143 transactions from March – December, 2013). For 2014, the agency found that respondent's card was used in Wisconsin in February, 2014 (2 transactions), September, 2014 (3 transactions) and October, 2014 (4 transactions). The respondent's card was used every month from February – December, 2014 for a total of 79 transactions in Illinois. The respondent's card was used in

Minnesota in January, 2014 (13 transactions), February, 2014 (3 transactions) and October, 2014 (1 transaction). For the period of January – April, 2015, respondent's card was not used in Wisconsin. It was used in Illinois in January, 2015 (9 transactions), February, 2015 (11 transactions), March, 2015 (1 transaction) and April, 2015 (1 transaction). It was also used in Minnesota in February, 2015 (3 transactions), March, 2015 (12 transactions) and April, 2015 (2 transactions).

17. On October 23, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent received Wisconsin FS benefits when she was living in Minnesota.
18. The respondent failed to appear for the scheduled November 24, 2015 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. The evidence presented by the agency is overwhelming to demonstrate that the respondent provided false information regarding her residence and household composition in order to receive Wisconsin FS benefits. The address provided by the respondent in her applications was verified as an apartment being rented by others that do not have any apparent association with the respondent. The school records of respondent’s nephew clearly demonstrate that he did not reside with the respondent from at least January, 2014 – 2015. The EBT usage analysis by the agency clearly demonstrates that the respondent’s benefits were rarely used in Wisconsin with only 35 total transactions in Wisconsin for the period of January, 2013 – April, 2015 out of a total of 333 transactions on respondent’s card during that period. The majority of the transactions were in Minnesota (177 transactions) with a large number of transactions also occurring in Illinois (121 transactions). Based on the evidence, I conclude that the respondent committed an intentional program violation by applying for benefits as a Wisconsin resident when she did not live in Wisconsin and that she intended to commit the violation when she continued to report a Wisconsin residency throughout the period of 2013 – 2015. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that recipients must be residents of Wisconsin to receive Wisconsin FS benefits.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.
- 3.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

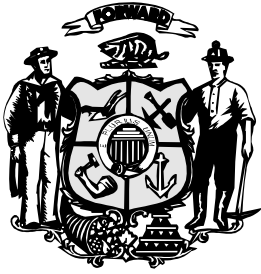
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 4th day of January, 2016

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Tanya Allen - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 4, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
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